

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the
District of Columbia

JANUARY TERM, 1940.

No. 7639

635

WILLIAM F. BRICE, APPELLANT,

vs.

ALBERT W. WALKER,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

FILED MARCH 23, 1940

PRINTED MAY 8, 1940

United States Court of Appeals for the District of Columbia

JANUARY TERM, 1940.

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vs.
ALBERT W. WALKER, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

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United States Court of Appeals for the District of Columbia

A. District Court of the United States
For the District of Columbia
Civil Action, File No. 3601
WILLIAM F. BRICE, *Plaintiff*,
vs.
ALBERT W. WALKER, *Defendant*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, that in the District Court of the
United States for the District of Columbia, at the
City of Washington, in said District, at the times
hereinafter mentioned, the following papers were
filed and proceedings had, in the above-entitled
cause, to wit:

1 *Complaint*
(Note)

· Filed July 29 1939

In the District Court of the United States
For the District of Columbia
Civil Action, File No. 3601

WILLIAM F. BRICE, 1422 K Street, N. W., Washington, D. C.,
Plaintiff,
vs.

ALBERT W. WALKER, 925 - 15th Street, N. W., Washington,
D. C., *Defendant*.

The complaint of William F. Brice for money judgment
against defendant Albert W. Walker respectively sheweth
as follows:

1. That the amount claimed in this action is more than
One thousand (\$1000.00) Dollars and the plaintiff and
defendant are citizens of the United States and residents
of the District of Columbia.

2. Heretofore, to wit: April 29, 1931 the defendant executed his promissory note in the sum of Sixty-five hundred seventy-eight and $51/100$ (\$6578.51) Dollars to the order of Helen Carroll, bearing interest at the rate of six (6%) per centum per annum. Principal and interest being paid in monthly installments of one hundred fifty (\$150.00) Dollars, with the privilege of making larger payment in any amount, on the 29th day of each and every month thereafter until paid; each installment when so paid to be applied first to interest and the balance to principal.

That simultaneously with and as part of the transaction for the execution and delivery of said note the said Albert

W. Walker executed and delivered, under seal, his
2 certain deed of trust to Ralph L. Sabin and Francis

L. Hawes, as trustees, conveying Lot Forty-seven (47) in Square Twenty-one hundred seventeen (2117) in the District of Columbia, to said trustees to secure the payment of said note. Said deed of trust further evidenced the debt of the defendant in the sum of Sixty-five hundred seventy-eight and $51/100$ (\$6578.51) Dollars to the order of Helen Carroll. A copy of said note and deed of trust are attached hereto in the plaintiff's bill of particulars.

That before payments became due on said note, for value, the said Helen Carroll indorsed the said note without recourse and delivered it to the who then became and is *know* the holder and owner thereof.

3. That from, to wit: May 29, 1931 to August 7, 1932 the defendant reduced the principal of said note as shown in the said bill of particulars to the sum of Fifty-two hundred forty-two and $83/100$ (\$5242.83) Dollars and since August 7, 1932 the defendant has not paid any sums on the principal or interest of said note although the same is entirely now over due.

4. Wherefore, the plaintiff claims judgment against the defendant on account of said note and deed of trust in the sum of Fifty-two hundred forty-two and $83/100$ (\$5242.83) Dollars, with interest from August 7, 1932 besides costs.

HERMAN MILLER

Attorney for Plaintiff

3

Bill of Particulars

Filed July 29 1939

*

*

*

Copy of Deed of Trust Note:

\$6,578.51

Washington, D. C., April 29, 1931

For value received, I promise to pay to the order of Helen Carroll, Sixty-five hundred and seventy-eight and 51/100 Dollars, with interest from date until paid at the rate of six per centum per annum.

Said principal and interest being payable in monthly installments of One hundred and fifty Dollars (with privilege of making larger payments in any amount), on 29th day of each and every month after date, until paid; each installment when so paid to be applied first, to the payment of interest on the amount principal remaining unpaid, and the balance thereof credited to the principal.

No. 1 of 1

And it is expressly agreed that if default be made in the payment of any one of the aforesaid installments when and as the same becomes due and payable, then in that event, the unpaid balance of said principal sum shall, at the option of the holder hereof, at once become due and payable, anything contained to the contrary notwithstanding.

(Signed) ALBERT W. WALKER
913 - 15th Street, N. W.

Retain this note when paid that the Trustees may be satisfied as to its cancellation.

Statement appearing on side of note:

The District Title Insurance Company, The Lawyers Title Insurance Company, The Washington Title Insurance Company

SECURED BY DEED OF TRUST

To Ralph L. Sabin and Francis L. Hawes, Trustees;

Conveying Lot 47 in Square 2117.

Payments on account of above note, and interest, are acknowledged as follows:

Date of payment	Interest Due	to Principal	Balance principal due
1931			
May 29	\$32.89	\$117.11	\$6461.40
June 30	32.31	117.69	6342.71
Aug. 3	31.72	118.28	6225.43
Aug. 31	31.13	118.87	6106.56
Nov. 13	61.06	238.94	5867.62
Dec. 14	29.34	120.66	5746.96
Jan. 21 1932	28.73	121.27	5625.69
Mar. 31	84.38	365.66	5260.03
Oct. 7	157.80	17.20	5242.83

The above described note being secured by a deed of trust dated April 29th, 1931 and recorded among the land records of the District of Columbia on April 30th, 1931, as instrument No. 12414 signed by the said defendant and his wife Florence W. Walker, which was executed simultaneously with, and the aforesaid note delivered as part thereof to Ralph L. Sabin and Francis L. Hawes, which deed of trust was sealed by the defendant, and in which said deed of trust the defendant acknowledged, under seal, that he stood justly indebted unto the payee of the note which was described therein and which is above described and which was endorsed to the plaintiff for value.

5

Filed November 15 1939

C. C. F.

Office of the Recorder of Deeds
District of Columbia

Stipulated at hearing that this is the deed of trust (certified copy) mentioned in complaint, and to be considered as part thereof.

Proctor J

Nov 15/39

No. 12414

Recorded April 30, 1931. at 2:51 P. M.

Deed of Trust

This Deed of Trust, made this 29 day of April, in the year nineteen hundred and thirty-one by and between

Albert W. Walker, and his wife, Florence W. Walker, of the District of Columbia, parties of the first part; and Ralph L. Sabin and Francis L. Hawes, trustees, of the said District, parties of the second part:

Whereas, the said Albert W. Walker is justly indebted unto Helen Carroll in the full sum of Sixty-five hundred and seventy-eight and 51/100 dollars (\$6,578.51), for money loaned, for which amount he has made and delivered his one certain promissory note of even date herewith, numbered one of one, payable to the order of the said Helen Carroll, with interest thereon at the rate of six per centum per annum until paid; said principal and interest being payable in monthly instalments of one hundred and fifty dollars (\$150.00) (with the privilege of making larger payments in any amount on the 29 day of each and every month after date until paid, each instalment when so paid, to be applied, first, to the payment of the interest on the amount of principal remaining unpaid, and the balance thereof credited to the principal.

And whereas, the parties hereto of the first part desire to secure the full and punctual payment of said debt and interest thereon, as well as any and all renewals or
6 extensions of said note or of any part thereof, with interest on such renewals or extensions, at such rate of interest as may be agreed upon, and any notes given for interest covering any extension, with interest thereon from maturity of the same (which renewals or extensions of the debt or any part thereof hereby secured, or any change in its terms or rate of interest payable on same, shall not impair in any manner the validity of, or priority of this trust); and also to secure the reimbursement to the holder or holders of said note and to the parties hereto of the second part, or substituted trustee, and any purchaser or purchasers, grantee or grantees under any sale or sales under the provisions of this trust, for all money which may be advanced as herein provided for, and for any and all costs and expenses (including reasonable counsel fees) incurred or paid on account of any litigation at law or in equity, which may arise in respect to this trust, or to the indebtedness or to the property herein mentioned, or in obtaining possession of the premises, after any sale which may be made as hereinafter provided for.

Now, therefore, this deed of trust witnesseth, that the parties hereto of the first part, in consideration of the premises, and of One dollar in lawful money, do grant and convey unto the parties hereto of the second part, in fee simple, the following-described land and premises, with the improvements, easements, rights, ways, and appurtenances thereunto belonging, situate, and lying in the District of Columbia, namely:

Lot numbered Forty-seven (47) in Clyde B. Asher's subdivision of lots in Square numbered Twenty-one hundred and seventeen (2117), in the subdivision known as "Massachusetts Avenue Heights", as per plat recorded in Liber 69 at folio 183 in the Surveyor's Office of the District of Columbia; subject to the perpetual building restriction line as shown on said plat;

7 In and upon the uses and trusts following, that is to say:

First.—Until any default in payment of any matter of indebtedness hereby secured as herein provided for, to permit the said Albert W. Walker, and his heirs and assigns, to possess and enjoy said described premises, and to receive the rents, issues, and profits thereof; and on full payment of said note and of any extensions or renewals thereof and interest thereon and all sums advanced or expended as herein provided, and all other proper costs, charges, expenses, commissions, and half commissions, at any time before the sale hereinafter provided for, to release and reconvey unto and at the cost of the said Albert W. Walker, or the party or parties then claiming under him, the aforesaid land and premises.

Second.—Upon any default being made in payment of said promissory note or of any installment of principal or interest thereon, or on any renewal or extension thereof, or of any note or notes hereafter given for interest covering any extension, with interest thereon from maturity of the same, when and as the same shall become due and payable; or upon any default in payment when due, of any tax or assessment, general or special, now or hereafter assessed against said land and premises, or any part thereof, while this trust exists, or upon any default in keeping while this trust exists, a fire insurance on the buildings on said land in an amount, in the name, and to the satisfaction of the

parties hereto of the second part, who may select and designate the company or companies in which such insurance shall be placed, and who shall apply whatever may be received therefrom to the payment of the matters hereby secured, whether then due or not, unless the party entitled to receive the same shall waive the right to have the same so applied, or upon default in payment on demand, of any sum or sums advanced by the holder or holders of

8 said note on account of any costs and expenses of this trust, or on account of any such tax or assessment, or insurance, or expense of litigation, or on account of any lien, deed of trust or mortgage on said land and premises, prior in lien to this trust, with interest thereon at six per centum per annum from date of advance (it being hereby agreed that on default in payment of said costs, expenses, tax, or assessment, or insurance, or expense of litigation, or such prior lien, deed of trust or mortgage as aforesaid, the same may be paid by the holder or holders of said note, and all sums advanced in so doing, with interest as aforesaid, shall forthwith attach as a lien hereunder and be demandable at any time); then upon any and every such default so made as aforesaid, the said parties hereto of the second part, or substituted trustee shall sell the aforesaid land and premises and improvements at public auction, at such time and place, upon such terms and conditions, and after such previous public notice, with such postponement of sale or resale, as to the said parties of the second part or substituted trustee, shall seem best for the interest of all parties concerned; and (the terms of sale being complied with) shall convey in fee to and at the cost of the purchaser, the premises so sold, such purchaser being hereby discharged from all liability for the application of the purchase money; and shall apply the proceeds of sale (after paying all expenses of sale, all taxes and assessments thereon due, all sums advanced as herein provided for, with interest as aforesaid, and a trustee's commission of five per centum on the gross amount of sales) to the payment of the said notes, whether then due or not, and the interest thereon to date of payment (it being agreed that the said note shall, upon such sale being made before the maturity of said note, or before the maturity of any renewal or extension thereof, be and become imme-

diately due and payable at the election of the holder thereof), paying over the surplus if any, to the said Albert W. Walker, and his heirs or assigns, upon the surrender and delivery to the purchaser, his, her, or their heirs or assigns, of possession of the premises so as aforesaid sold and conveyed, less the expense, if any, of obtaining possession thereof.

And the Albert W. Walker, does hereby covenant that he will warrant specially the property hereby conveyed, and that he will execute such further assurances of said land as may be requisite for vesting title in the said parties hereto of the second part, for the uses and purposes, and upon the trusts hereinbefore declared; and will pay the aforesaid taxes and assessments and fire insurance premiums as the same become due and payable during the existence of this trust, and while he owner of said land and premises.

And it is further covenanted and agreed that if the said property shall be advertised for sale, as hereinbefore provided, and not sold, the trustee or trustees acting shall be entitled to one-half of the commission above provided, to be computed on the amount of the debt hereby secured.

In testimony whereof, on the day and year first hereinabove written, the said parties hereto of the first part have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of—

R. J. VIERBUCHEN

ALBERT W. WALKER (Seal)

FLORENCE W. WALKER (Seal)

10 DISTRICT OF COLUMBIA, *To wit:*

I, R. J. Vierbuchen, a Notary Public in and for the said District of Columbia, do hereby certify that Albert W. Walker and Florence W. Walker, parties to a certain deed bearing date on the 29th day of April, A. D. 1931, and hereto annexed, personally appeared before me in said District, the said Albert W. Walker and Florence W. Walker, being personally well known to me as the persons who executed the said deed, and acknowledged the same to be their act and deed.

Given under my hand and seal this 29th day of April
A. D. 1931.

(Notarial Seal)

R. J. VIERBUCHEN
Notary Public, D. C.

11 C. C., A.

Office of the Recorder of Deeds
District of Columbia

THIS IS TO CERTIFY that the foregoing is a true and
verified copy of an instrument as recorded in Liber 6551,
folio 311, et seq., one of the Land Records of the District
of Columbia.

E A G.

IN TESTIMONY WHEREOF, I have hereunto set my
hand and affixed the seal of this Office this 6th day of Nov.,
A. D. 1939.

(Seal) WM. J. THOMPkins—
Recorder of Deeds, D. C.

(Endorsed) Certified Copy of Trust A. W. Walker et ux
to Sabin & Hawes, Trs.

As Received for Record on the 30th day of April, 1931,
at 2:51 P. M., and recorded in Liber No. 6551, folio 311, et
seq., one of the Land Records of the District of Columbia.

WM. J. THOMPkins,
Recorder.

12 *Answer, to Complaint on Note.*

Filed August 18 1939

* * *

First Defence.

The complaint fails to state a claim against the defen-
dant upon which relief can be granted.

Second Defence.

Defendant admits he is a citizen of the United States;
denies he is a resident of the District of Columbia; is

without knowledge or information sufficient to form a belief as to remaining allegations of paragraph 1. Answering so much of paragraph 2 as may be material, defendant denies that the deed of trust has any effect or operation such as alleged therein. Defendant is without sufficient knowledge or information to form a belief as to third subparagraph of paragraph 2 of the complaint. Answering the remaining paragraphs of the complaint, defendant denies that he is indebted to plaintiff in the sum alleged, or in any other sum whatsoever.

Third Defence.

The alleged right of action set forth in the complaint did not accrue within three years next before the commencement of this action.

JOHN SUMNER WOOD—
and
PAUL FLAHERTY
Attorneys for Defendant.

13 *Motion of Defendant for Judgment on the Pleadings.*

Filed October 28 1939

* * *

Defendant, Albert W. Walker, moves the Court for judgment on the pleadings, as provided by Rule 12 (c), Federal Rules of Civil Procedure.

JOHN SUMNER WOOD—
PAUL FLAHERTY
Attorneys for Defendant.

Motion of Plaintiff for Judgment on the Pleadings.

Filed November 2 1939

* * *

The plaintiff, William F. Brice, by his attorney, moves the Court for judgment on the pleadings as provided by Rule 12 (c) Federal Rules of Procedure for the District Court of the United States for the District of Columbia.

HERMAN MILLER
Attorney for Plaintiff

Order for Judgment for Defendant on Pleadings.

Filed December 19 1939

*

*

*

This action came on to be heard at this term of court; and thereupon, upon consideration thereof, it is by the Court this 19th day of December, 1939, adjudged as follows:

That the said motion of the defendant Albert W. Walker for judgment on the pleadings filed herein be and the same is hereby sustained.

14 That the said motion of the plaintiff for judgment on the pleadings filed herein be and the same is hereby dismissed.

JAMES M PROCTOR
Justice.

Seen:

HERMAN MILLER
Attorney for Plaintiff.
Per Sarah Wallace

Notice of Appeal

Filed January 9 1940

*

*

*

Notice is hereby given this 9th day of January, 1940, that William F. Brice hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 19th day of December, 1939 in favor of Albert W. Walker against said William F. Brice

HERMAN MILLER
Attorney for Plaintiff

Memoranda

January 13—1940.

Bond (\$250) of plaintiff on appeal—filed.

February 16—1940.

Time to file transcript of record in United States Court of Appeals extended to and including March 25, 1940.

Designation of Record

Filed February 12 1940

*

*

*

The plaintiff having perfected an appeal herewith to the United States Court of Appeals for the District of Columbia on the 9th day of January, 1940, hereby requests the Clerk of the District Court of the United States for the District of Columbia to prepare, at the plaintiff's expense, a transcript of record of appeals, including therein the following papers and proceedings namely:

1. Complaint and Bill of Particulars.
2. The deed of trust filed as an exhibit.
3. Answer of the defendant.
4. Motion of defendant for judgment on the pleadings.
5. Motion of plaintiff for judgment on the pleadings.
6. Together with a copy of this designation.

HERMAN MILLER

Attorney for Plaintiff, Appellant.

February 9, 1940.

Service of copy of the foregoing designation admitted this 9 day of February, 1940.

JOHN SUMNER WOOD

Attorney for Defendant, Appellee.

District Court of the United States
For the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, CHARLES E. STEWART, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 15, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 3601, Civil Action, wherein William F. Brice is Plaintiff and

Albert W. Walker is Defendant, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 23rd day of March, 1940.

C. E. STEWART,

(Seal)

Clerk.

Endorsed on Cover: No. 7639. William F. Brice, Appellant, vs. Albert W. Walker. United States Court of Appeals for the District of Columbia Filed Mar 23 1940
Joseph W. Stewart, Clerk.

United States Court of Appeals for the
District of Columbia

JANUARY TERM, 1940.

No. 7639.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED MAY 28 1940

WILLIAM F. BRICE,
APPELLANT,

Joseph W. Stewart

vs.

ALBERT W. WALKER,
APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

APPELLANT'S BRIEF.

HERMAN MILLER,
Attorney for Appellant.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

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United States Court of Appeals for the
District of Columbia

JANUARY TERM, 1940.

No. 7639.

WILLIAM F. BRICE,
APPELLANT,

vs.

ALBERT W. WALKER,
APPELLEE.

APPELLANT'S BRIEF.

Statement of the Case.

The appellant filed his complaint for money judgment in the District Court of the United States for the District of Columbia for the sum of \$5242.83 with interest from October 7, 1932 besides costs under a note executed by the appellee on April 29, 1931 upon which principal and interest was due in monthly installments of \$150.00 running until paid (R. 1-2). The complaint further set forth that as part of the transaction the appellee executed and delivered, under seal, a deed of trust wherein he acknowledged the said debt (R. 2). A copy of the note and deed of trust were set forth as

the bill of particulars (R. 3 to 9). Said deed of trust referred to and described the note and was executed simultaneously therewith (R. 2 to 9). Payments were acknowledged on said note reducing the same from its original amount of \$6578.51 to \$5242.83 as of October 7, 1932 since which time no further payments were made (R. 4).

The defense filed by the defendant denied indebtedness upon the Statute of Limitations (R. 10).

Both the appellant and the appellee thereafter filed motion for judgment on the pleadings (R. 10). The trial judge entered a judgment on the pleadings for the appellee, holding that the indebtedness was a simple contract and not a sealed obligation (R. 10).

Questions of Law Before the Court.

The only question of law before the Court may be summarized as follows:

Whether the indebtedness described in the note and deed of trust is a debt under seal or a simple debt.

If the debt was a sealed obligation then the statute had not run and the judgment entered was in error.

Argument.

The facts of this case were not disputed. The execution of the note and deed of trust set forth in the bill of particulars are admitted by the appellee. The sole question is whether the indebtedness of the defendant

set forth in said note and deed of trust, both of which are executed simultaneously as part of the same transaction and each referring to the other is barred in that the same constitutes a simple debt or whether the same constitutes a debt for which an action may be obtained for a period of 12 years from its accrual.

The appellant maintains that the claim is not barred for the following 3 reasons:

1. That the indebtedness of the defendant is evidenced in the sealed deed of trust signed by him.

2. That the deed of trust signed by the appellee simultaneously with the note, as part of the same transaction, acknowledges, under seal, the indebtedness of the appellee, telling the statute of a 12 year period.

3. That the deed of trust and note being executed simultaneously as part of the same transaction each referring to the other are to be considered as one and the instrument therefore constituting a sealed instrument.

Taking each of the above paragraphs separately the appellant contends:

1. That the indebtedness of the defendant is evidenced in a sealed contract signed by him. A deed of trust is a contract similar to any other contract under which the party to be charged may agree therein and promise to pay. While the deed of trust acts also as security, it is still nevertheless the contract in which the appellee "the said Albert W. Walker is justly indebted." At the time of the execution thereof there

was an unreserved agreement contained in the note and in the deed of trust to pay a debt described therein. Even if a note had not been executed the deed of trust contained the promise and agreement of the appellee to pay which, like any other contract, might be assigned. Section 1271 of the Code of Laws for the District of Columbia amended to June 7, 1924 provides that a continuing contract to take the case out of operation of the Statute of Limitations must be in writing. The deed of trust fully complies with this requirement since the same is under seal the obligation and undertaking of the parties signing the same is a sealed instrument. The deed of trust, as signed by the appellee, states that he is indebted which in itself is a contract. In *Nichols vs. Henry*, 98 Iowa 34, suit was brought by Nichols as the assignee of a mortgage dated October 17, 1860. The mortgage was given to secure the payment of \$800.00 to be paid December 25, 1862. The period of limitation in Iowa on simple debt is 6 years and on written contracts, 20 years. There was no further writing except the mortgage itself. The defense was, the 6 years limitations applied in that there was no written promissory note or other obligation separate of the mortgage. The Court held that this defense was inadequate in that the mortgage itself contained the mortgager's express contract in writing.

Fields vs. Brokaw, 148 Ill. 654. The mortgage was given to secure an open account and recited the express promises of the mortgagor to pay the same. Such recitals were written evidence of the indebtedness so as to bring the action within limitations of 10 years as provided by section 16 of the Limitations Law (10 year period in this section applies under sealed instru-

ments). The appellant contends that recitals of the indebtedness in the deed of trust executed by the appellee constitutes of themselves a written evidence of his indebtedness and in view of the fact that the deed of trust is sealed, such written evidence is a sealed instrument and was not barred.

2. The deed of trust can also be said to be an act under seal. The authorities throughout the country are universal and in accord to the effect that an acknowledgment of a debt, if the same is unconditional and clear, will toll the running of the statute. This action is based upon the note and deed of trust. The deed of trust unconditionally in detail recites an agreement of the appellee and since the same is under seal, evidences the obligation of the appellee for a period of 12 years. This was held in *King vs. Riddle* 7 Cranch (11 U. S.) 168. Riddle sued King, who in the year 1798, being taken in execution upon judgments gave a bond which he forfeited, the plaintiff (who was not bound in the bond) at the defendant's request later paid 1/6 of the judgment. The evidence adduced described a paper signed and sealed by the defendant on the 18th day of July, 1804 acknowledging the debt in which the defendant stated he was desirous of securing the plaintiff as far as he could. Court in holding that this deed, under seal, extended the statute said as follows: "The Court is of the opinion that the recital in the deed is sufficient to take the case ^{out of} with the Statute of Limitations." This Court has announced what constitutes an acknowledgment to toll the statute in *Catholic University of America vs. Waggaman*, 32 App. D. C. 307, this last case shows the indebtedness of the defendant to have been barred except for a sworn statement which

the defendant made and was filed in bankruptcy cause of Thomas E. Waggaman, whose notes the defendant endorsed. This Court said "in deciding what an acknowledgment consists of, no set form is required to constitute the acknowledgment of the debt. It is sufficient if the writing be such that the admission of the debt is a subsisting one." In the instant case, the appellee Walker, executed the deed of trust, under seal, stating that he was indebted to the payee of the note, his obligation became a sealed one and was extended for a period of 12 years. In *Strong vs. Andros*, 34 App. D. C. 281, it was said, "The code makes either an acknowledgment or a promise sufficient to relieve the balance of the statute. Both are not required. The acknowledgment need not be in any particular form nor contain any particular statements." When the appellee, Walker in this case, executed the note and the deed of trust the statement and the deed of trust of his obligation was unconditional, it was just as much a part of a transaction as any other part and was definitely evidenced in writing under seal and this obligation was created to run for 12 years, with the intention, at time of execution, to pay the same as the monthly payments became due.

3. In addition to all of the above it may be further stated that the deed of trust and note are one and the same instrument because they were executed simultaneously, as part of the same transaction and each refer to the other. This Court announced in *Cafritz Company vs. Mudrick*, 61 App. D. C. 189; *Hoover et al. vs. Wardman*, 61 App. D. C. 171 and *Hutchins vs. Wardman*, 61 App. D. C. 192, that in such cases the said note and deed of trust are to be considered as one

and the same instrument. In the Cafritz case, *supra*, a deed of trust contained an acceleration clause which was not contained in the note and the defense was that the obligation sued upon had not yet matured. This Court held that the obligation did mature in that the acceleration clause in deed of trust matured the entire debt holding, "It is elementary when several writings are executed between the same parties, in the same course, and as part of the same transaction, and intended to accomplish the same general object, they are to be construed as one and the same instrument. Citing 8 C. J. 196, especially is this true where one instrument refers to the other." This Court in support of this decision cited many cases from other jurisdictions laying down the same principles.

This Court then construed that papers executed as in the instant case are to be read together and to be construed as the same instrument. This being so causes the debt of the appellee to be a sealed instrument and the deed of trust contains an express covenant on part of the appellee to pay the debt since the note and the deed of trust are to be read together. The provisions of the note are transposed into and becomes part of the deed of trust and *vice versa*.

The appellee has contended that the deed of trust does not contain a covenant to pay the debt. But if the Cafritz case, *supra*, is read it will be seen that the note and deed of trust being one and the same instrument, the unconditional promise of the appellee contained in the note, is part of the deed of trust.

Even if the Cafritz case is not considered as authoritative and assuming the note and deed of trust must

be considered separately, it was held in *Shepard vs. Thompson*, 122 U. S. 231, 30 Le E 1156 that an unqualified acknowledgment of a debt for which a promise to pay may be implied will take the case out of the Statute. In the instant case when Walker executed the deed of trust he certainly acknowledged the debt with an intention of paying the same at that time and upon this a promise can be implied in the deed of trust. The Court said in the *Shepard Case*, *supra*, "In order to continue or revive the cause of action, after it would otherwise have been barred by the Statute, there must be an express promise of the debtor to pay or else an express acknowledgment of the debt from which the promise to pay it may be inferred." This certainly existed in this case. The deed of trust executed by Walker contains an express acknowledgment of the debt from all of which a promise may be inferred and at that time Walker was willing to pay the same.

In *Maniatakis Estate*, 258 Pa. 284 the Court said "a clear distinct acknowledgment of a debt as an existing obligation is consistent with a promise to pay, is sufficient to toll the statute."

In *Green vs. Reeves*, 47 App. D. C. 683, this Court said that a distinct and unequivocal acknowledgment of the debtor of a debt as a still subsisting personal obligation constitutes a promise to pay it, citing *Ruppert vs. Beavers*, 2 App. D. C. 298, and *Catholic University vs. Waggaman*, *supra*.

So that the deed of trust meeting all the principles of an acknowledgment which is clear would have an implied promise contained therein and being under seal the defense of the Statute is not available.

By way of conclusion, it is most respectfully urged that the trial justice erred in holding that the appellant's claim is barred by limitation in that the note and deed of trust being one and the same instrument, the obligation is a sealed one which was not barred at time suit was filed; secondly, the deed of trust is a contract itself under seal which contains an implied promise and, thirdly, the deed of trust contains an unqualified acknowledgment of the debt, which the appellee was then willing to pay, contains said implied promise to pay which is under seal.

For all of the above reasons there can be no question. It is respectfully contended that the obligation was a sealed one, which, at the time suit was filed was subsisting and not barred as being a simple unsealed obligation. It is respectfully urged that the judgment of the lower Court be reversed with costs.

HERMAN MILLER,
Attorney for the Appellant.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1940.

No. 7639.

WILLIAM F. BRICE, *Appellant*,

v.

ALBERT W. WALKER, *Appellee*.

BRIEF ON BEHALF OF APPELLEE.

STANTON C. PEELLE, JR.,
Attorney for Appellee.

PEELLE, LESH, DRAIN & BARNARD,
Of Counsel.

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ALBERT W. WALKER, *Appellee*.

BRIEF ON BEHALF OF APPELLEE.

This is an appeal from a judgment of the District Court of the United States for the District of Columbia sustaining the motion of defendant (appellee) for judgment on the pleadings under Rule 12 (c) of the Federal Rules of Civil Procedure, and denying a like motion of the plaintiff (appellant).

STATEMENT OF FACTS.

The appellant is the holder of a promissory note executed by appellee, Albert W. Walker, on April 29, 1931,

payable to one Helen Carroll, in the sum of \$6,578.51. It is conceded by appellant that this note, if it stood alone, would be barred by the Statute of Limitations. The note was secured by a deed of trust, of like date and "executed simultaneously with" the note (R. 4), by which said Albert W. Walker, and his wife, Florence W. Walker, conveyed certain real estate to Ralph L. Sabin and Francis L. Hawes, as trustees, upon the usual trusts providing for sale of the real estate in the event of default upon the note. The deed of trust contained the usual recitals to the effect that appellee Walker "is justly indebted" to said Helen Carroll and that "the parties hereto of the first part desire to secure the full and punctual payment of said debt and interest thereon . . ." The deed of trust was under the seals of said appellee Walker and his wife, and in all material respects, the note and deed of trust were identical in form with those long in use in the District of Columbia. At the hearing below, appellee denied indebtedness, and pleaded the Statute of Limitations (R. 10). The plea of the Statute was sustained by the judgment of the Court (R. 11).

ARGUMENT.

- 1. The Debt of a Promissory Note Remains a Simple Debt, and is Not Converted Into an Obligation Under Seal by the Mere Execution of a Deed of Trust Simultaneously Therewith.**

Promissory notes secured by deed of trust, in form substantially identical with the note and deed of trust here involved, have been in common use in the District of Columbia since the middle of the last century. We believe it has been the universal impression of the justices of the courts and counsel alike that such promis-

sory notes were subject to the period of the Statute of Limitations applicable to simple debts, unaffected by the simultaneous execution of deeds of trust under seal, although the power to enforce the deed of trust remained unaffected by the bar of the remedy on the note.

Despite the large volume of such secured notes which have long been in circulation here, we cannot discover that it has ever been seriously contended before the Courts of the District that such notes should be regarded as obligations under seal. It is significant that not one of the cases cited by appellant, from this or any other jurisdiction, involved the Statute of Limitations as applicable to a note secured by deed of trust.

In the few cases which we have found arising in the District which in any way touch upon this question, it is the necessary implication of the decisions that the note was barred even though the remedy under the deed of trust remained, and the 12-year period applicable to instruments under seal had not expired.

In *Totten v. Harlowe*, 67 App. D. C. 132, 90 F. 2d 377, it was stated that the lower court had found that the remedy on a promissory note was barred by the Statute, although the 12-year period had not expired and foreclosure was entertained under a deed of trust executed simultaneously therewith. Appellants therein were strenuously arguing that surplus rents could not be awarded to the secured parties because no deficiency judgment could be obtained against the maker of the notes, but it did not occur to any of the parties or the court that the Statute as it affected the note had been extended by execution of the deed of trust.

The necessary implication of the decision in *Shepherd v. Pepper*, 133 U. S. 626, 651, 33 L. ed. 706, was that the maker of promissory notes secured by deed of

trust could plead the statute applicable to simple contracts although the period applicable to sealed instruments had not expired. And in *Murphy v. Wolfe*, (Sup. Ct. D. C.), 44 W. L. R. 579, it was held that the defense of the Statute was good in suit upon a note secured by deed of trust, although it was obvious that the statute of limitations would not have run upon an instrument under seal.

2. Appellant's Points Are Unsound, and He Does Not Support Them by a Single Authority.

A. The deed of trust is not a contract for the payment of money.

Like all carefully drawn deeds of trust, the deed herein involved recites that appellee is "justly indebted . . . for money loaned . . . for which amount he has made and delivered his one certain promissory note of even date herewith" (R. 5), and further recites that "the parties hereto of the first part desire to secure the full and punctual payment of said debt and interest thereon" (R. 5).

These recitals are obviously for purposes of identification and construction. It is difficult to see how the deed of trust could more clearly have expressed the fact that the contract for the payment of money was contained in the note, and that the deed of trust merely constituted further security. If the deed of trust constituted a contract for the payment of money, there would have been no point in the execution of the note, and, indeed, two contracts for payment of the identical sum would have been created. Furthermore, it is to be noted that the note was executed by appellee Walker and was payable to one Helen Carroll, whereas the deed of trust was executed by appellee Walker and his

wife, and the grantees therein were Sabin and Hawes as trustees.

Neither case cited by appellant upon this point involved either a promissory note or a deed of trust. He cites *Nichols v. Henry*, 98 Iowa 34 (no such case could be found), by which we believe the case of *Nichol v. Henry*, 98 Indiana 34 (1884) is intended. That case, however, was a foreclosure suit upon a mortgage which acknowledged a debt, but was not accompanied by any note or other evidence of indebtedness. The Court, by a 3 to 2 decision, held as a matter of construction that the mortgage contained an express promise to pay in writing. Appellant also cites *Fields v. Brokaw*, 148 Ill. 654 (1893). That case involved a foreclosure suit upon a mortgage which recited that it secured an indebtedness upon an open account, there being no note or bond secured by the mortgage. It was held that the mortgage itself constituted a contract to pay money.

Appellant appears to abandon his claim that the deed of trust constitutes a separate contract by his subsequent argument that the deed of trust and note are "one and the same instrument" because executed simultaneously as part of the same transaction.

We have found no authority directly in point, but we think there is an obvious analogy in the well-established rule that "a judgment for a deficiency is barred when the debt is barred, though an action to foreclose the mortgage is not barred." See 2 Jones, Mortgages, (8th ed.) 1044, #1545, and cases therein cited, and 3 Jones, Mortgages, (8th ed.) 731, #2214. Obviously, if the mortgage rather than the note constituted the contract, the deficiency could be recovered as long as the mortgage could be sued upon.

A decision very nearly in point is that in *Gilmour v. Johnson*, 254 Mass. 294, 150 N. E. 87, in which defen-

dant had given plaintiff as further security for a pre-existing debt, a written instrument under seal reciting that he was "duly and justly indebted" to plaintiff. The Court held that although there was a clear acknowledgment of the debt, there was no promise to pay which would constitute a new contract to form the subject of suit.

B. The acknowledgment of the debt in the deed of trust did not extend the statute for the 12-year period applicable to sealed instruments.

We can not understand how an acknowledgment in a deed of trust executed simultaneously with a note could constitute evidence of a "new or continuing contract" within the meaning of T. 11, #5 of the D. C. Code. As this Court recently held in *Moore v. Snider*, ... App. D. C., 109 F. (2d) 840, the acknowledgment is only evidence, and the circumstances must show genuine intent to make a new promise. No new promise can be implied when the Statute has not commenced to run on the other promise, and we have found no case involving the effect of a simultaneous acknowledgment.

Even conceding that the acknowledgment in the deed of trust would have the same effect in taking the case out of the Statute as a new promise, the bar of the Statute would take effect at precisely the same time, since it is held by the great weight of authority that a new promise, made before the debt is barred, does not create a new cause of action, but merely suspends the bar of the Statute for another period of limitation dating from the new promise. *Dern v. Olsen*, 18 Ida. 358, 110 Pac. 164, L. R. A. 1915B, 1016; 17 R. C. L. 895 (Limitations, #254); 37 C. J. 1141 (Limitations

≡620). The "new promise" being dated simultaneously with the old would expire simultaneously.

But appellant has fallen into the error of assuming that the "new promise", being under seal, would extend the Statute for the 12-year period. This is not the rule, and the only case cited by appellant holds against him. That case, *King v. Riddle*, 7 Cranch (11 U. S.) 168, 3 L. ed. 304, held that a sealed instrument containing an acknowledgment could remove the bar of the Statute, but the action therein was in assumpsit, and the new period of limitations assumed by the Court to be applicable upon the sealed acknowledgment was only five years.

We have found no decision in which a new promise under seal, made before the Statute had run upon the original promise, has been held to start the Statute running upon a new period applicable to sealed instruments, and on principle, since the action is brought upon the original promise only, this should be the result. The Courts of Massachusetts have considered this question in several cases, and have expressly held that a new promise, though under seal, does not extend the Statute longer than the period applicable to simple contracts, when the new promise was made before the Statute had run upon the original promise. *Gilmour v. Johnson*, 254 Mass. 294, *supra*; *Gray v. Bowden*, 23 Pick (Mass.) 282; *Harding v. Covell*, 217 Mass. 120.

C. Construing the note and deed of trust together does not convert the note into a sealed instrument.

We readily concede the principle laid down in *Ca-fritz Const. Co. v. Mudrick*, 61 App. D. C. 189, 59 F. (2d) 864, and companion cases, that a note and deed of trust executed simultaneously as part of the same transaction must be construed as one instrument, but this would no more require that the note be thereby converted into a sealed instrument than it would require that the deed of trust be considered as lacking a seal because no seal is contained in the note. It is perfectly consistent to find that the obligation of the note shall constitute a simple contract only, while the security of the deed of trust shall continue as long as a sealed instrument is valid.

Appellant does not cite a single case in which it was held that the seal of a deed of trust or mortgage should be imputed to an unsealed note executed simultaneously therewith, and, indeed, authority is ample to the contrary.

In *McKenzie v. Matthews*, 153 Ala. 437, it was held that a debt on a note is barred in the six year period applicable to written contracts despite the fact that it is secured by a mortgage under seal. In *Angell, Limitations* (6th ed.), §92, the rule is stated that "Though a promissory note is secured by a mortgage, it still remains a simple contract; and its being recognized by a deed under seal does not change its character." To like effect are *Seymour v. Street*, 5 Neb. 85; *Jackson v. Sackett*, 7 Wend. (N. Y.) 94, 10 C. J. S. 508 (Bills & Notes, §75).

Furthermore, the inference that construction of two instruments as one does not necessarily make the Statute of Limitations applicable to one also applicable to

the other, is necessarily drawn from the line of decisions holding that the lien of the mortgage may be enforced in many situations where the debt is barred. *McCarty v. Goodsman*, 33 N. D. 389, 167 N. W. 503, L. R. A. 1918F, 160; *Bank of the Metropolis v. Gutschlick*, 14 Pet. (U. S.) 19, 10 L. ed. 335; 2 Jones, Mortgages (8th ed.) 1040, #1542. Cf., District of Columbia authorities cited in Part 1, *supra*. And the same inference must be drawn from those authorities holding that in a suit for foreclosure of a mortgage, there can be no decree for deficiency when the debt is barred. 2 Jones, Mortgages, 1044, #1545, *supra*, and cases therein cited.

CONCLUSION.

Appellant's contentions would upse the long-established practice and the prevailing view in this jurisdiction. Those contentions have been rejected in other jurisdictions, nor does appellant cite a single pertinent authority in support thereof. It is respectfully submitted that the Statute of Limitations has barred action upon the debt evidenced by the note in suit, and that the judgment of the District Court should be affirmed.

STANTON C. PEELLE, JR.,
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PEELLE, LESH, DRAIN & BARNARD,
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